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**COMMODITY FUTURES TRADING COMMISSION**

2033 K Street, NW, Washington, DC 20581

(202) 254 - 8955

(202) 254 - 8010 Facsimile

DIVISION OF  
TRADING AND MARKETS

November 6, 1992

Re:

Dear :

This is in response to your letter dated August 21, 1990 to the Division of Trading and Markets, as supplemented by your subsequent written correspondence,<sup>1/</sup> telephone conversations and a meeting with Commission staff, wherein you requested confirmation of your views that in connection with the administration of the \_\_\_\_\_ Program<sup>2/</sup> (the "Program") and the creation and operation of Joint Accounts thereunder: (1) neither \_\_\_\_\_ ( \_\_\_\_\_ or the "Company"), a registered futures commission merchant ("FCM"), nor \_\_\_\_\_, a cooperative, would be subject to regulation as a "commodity pool operator" ("CPO"), as that term is defined in Section 2(a)(1)(A) of the Commodity Exchange Act (the "Act"), 7 U.S.C. §2 (1988); and (2) neither \_\_\_\_\_ nor \_\_\_\_\_ would be subject to regulation as a "commodity trading

<sup>1/</sup> You supplemented the August 21, 1990 correspondence by letters dated October 12, 1990, December 18, 1990, January 17, 1991, June 14, 1991, July 12, 1991, July 17, 1991, August 22, 1991, September 30, 1991, October 31, 1991, February 19, 1992, March 18, 1992, March 27, 1992, July 16, 1992, July 29, 1992, August 11, 1992, September 1, 1992, September 12, 1992 and September 18, 1992, October 6, 1992 and October 12, 1992.

<sup>2/</sup> With your August 11, 1992 letter you enclosed a draft version of the \_\_\_\_\_ and with your September 18, 1992 letter you enclosed a draft version of the Joint Account Agreement (the "JAA") (discussed below). This letter is based, in part, upon the statements made in those versions of these Agreements.

advisor" ("CTA") as that term is defined in Section 2(a)(1)(A) of the Act.<sup>3/</sup>

Based upon your August 21, 1990 letter, as supplemented, we understand the facts to be as follows.

\_\_\_\_\_ is a business corporation which is operated as a cooperative authorized to issue two classes of common stock and to have a six-member Board of Directors. The Class A common stock, the owners of which are entitled to appoint five members to the Board, is owned 81 percent by \_\_\_\_\_ and 19 percent by \_\_\_\_\_.

\_\_\_\_\_ is a cooperative corporation whose principal activities consist of supplying its members, who are primarily grain elevators and agricultural supply cooperatives, with products, including petroleum products, which it purchases on their behalf on a cooperative basis. The primary products involved are fertilizer, agricultural chemicals, fuel, animal feed and related services.

\_\_\_\_\_ 's members are located primarily in the Midwest, Southwest and Mountain states.

\_\_\_\_\_, which is a business corporation that is operated as a cooperative, is a registered FCM and has as its principal activity the furnishing of commodity interest trading services as an FCM to its members who consist principally of grain elevators located throughout the United States.

\_\_\_\_\_ and \_\_\_\_\_ also each own one share of \_\_\_\_\_ 's Class B common stock. As is the case with any cooperative, members of \_\_\_\_\_ (who will also be the participants of the Program, as is discussed below) will be required to purchase stock in the Company, specifically, shares of Class B common stock.<sup>4/</sup> The owners of the Class B Common Stock are entitled to appoint one member to \_\_\_\_\_ 's Board of Directors.

<sup>3/</sup> Preliminarily, we note that the operation of the Joint Accounts may raise issues under the rules of the particular commodity exchange(s) on which contracts offered through the Program will be traded. In this regard, we recommend that you confirm with appropriate officials at each relevant exchange that the exchange's rules do not prohibit the operation of the Program and that the Program can be operated in compliance with those rules.

Further, the establishment of Joint Accounts under the Program may raise issues under federal or state law that are outside the jurisdiction of the Act -- e.g., issues relating to securities registration or income taxation. This letter should not be deemed to imply that we have in any way considered or passed upon any of such other issues.

<sup>4/</sup> Each shareholder, including \_\_\_\_\_ and \_\_\_\_\_, is permitted to own only one share of \_\_\_\_\_ 's Class B common stock.

currently acts as an FCM for commodity interest contracts based on energy products. will also act as an FCM for persons who wish to participate in the proposed Program (i.e., cooperatives). Persons who participate in the Program will do so by becoming an owner of an interest in one or more joint commodity interest trading accounts (the "Joint Accounts"). Thus, a person may open with a regular commodity trading account, maintain an interest in a Joint Account, or both. You have represented that acting as an FCM for "outside" customers will not have any direct effect on 's ability to act as an FCM for persons who participate in the Program. will clear all of its customers' trades (Program and non-Program customers) through a customers' omnibus account with , a registered FCM.

Only members in good standing of the cooperative system would be permitted into the Program.<sup>5/</sup> These customers have relatively small inventories of petroleum products on hand for resale to the public. The quantities involved rarely equal the number of gallons represented by a futures contract. For example, 42,000 gallons is the unit of trading for the New York Mercantile Exchange Heating Oil No. 2 futures contract. The Program will allow these small hedgers (initially expected to be fewer than 200) to pursue hedging strategies which, on a daily basis, will match their physical inventory positions.<sup>6/</sup> Such hedging strategies may involve the use of options.

To participate in the Program, a member must execute a CMA with <sup>7/</sup> The CMA provides for the estab-

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<sup>5/</sup> Thus, both grain elevators (to the extent of their involvement in the sale of petroleum products to, e.g., farmers for their tractors) and agricultural cooperatives may participate in the Program.

The CMA does, however, give the authority to waive this requirement and to permit as participants in the Program non-member affiliates of in which has at least a 50% ownership interest.

<sup>6/</sup> For the purpose of the position we are taking below, and as you previously confirmed to us, such hedging strategies will be restricted to the "bona fide hedging transactions and positions" set forth in Rule 1.3(z)(1). Commission rules referred to herein are found at 17 C.F.R. Ch. I (1992).

<sup>7/</sup> In connection with your request, the CMA states that the Commission has not required or to register as a CPO in connection with the operation of the Program.

lishment of a Joint Account in which and one or more cooperatives will have an ownership interest. A cooperative's relative interest in a Joint Account will be based on its hedging needs relative to the other (cooperative) Joint Account owners and . For example, if cooperative A carried an inventory of 15,000 gallons of gasoline, and cooperative B carried an inventory of 21,000 gallons of gasoline, and both wished to hedge their positions, they would each place an order for participation in a Joint Account with . would be required to place an order with for 6,000 gallons, the balance of the contract. would then place an order to sell one Heating Oil No. 2 futures contract for the /A/B Joint Account. As is noted above, the unit of trading for this contract is 42,000 gallons. Accordingly, cooperative A would have a 35.7% interest in the account, cooperative B a 50% interest, and a 14.3% interest. Margin to carry that position would be received by from cooperative A, cooperative B and in the ratio of their respective interests.<sup>8/</sup> Under

<sup>8/</sup> With respect to the extent of 's role in the Program, by your October 12, 1990 letter you explained that:

It is 's customers with whom would deal in the [Program]. has established with its customers a communications network using certain computer equipment as a means of tracking inventory levels, giving customers access to market information and permitting customers to place orders for physical inventory. This communications network would be used to facilitate the operation of the [Program]. will not solicit or accept orders for the [Program]. will not guarantee, secure or limit any customer position. is the controlling shareholder of and as such may receive dividends from .

Further with respect to this communications network, you have explained that the computer data entry would involve two separate screens. One screen, which has been in operation for some time, permits customers to place orders for physical delivery of petroleum products with . The other screen, which would become available shortly after approval of the program, would permit customers to place orders for futures or options contracts for hedging purposes with . Accordingly, it would be quite possible for Program participants to enter orders for the purchase of physical commodities on one computer screen (continued...)

the CMA, then, a separate Joint Account would be established for each new hedge position to be established.<sup>9/</sup>

has subordinated its interest in each Joint Account in which it has an interest to the interests of all other customers in 's customer segregated funds, such that in the event of bankruptcy by , Joint Account owners (other than ) would have a customer net equity claim against \_\_\_\_\_ and would only have a non-public customer net equity claim against .<sup>10/</sup>

, as an FCM, would separately account for and segregate the funds of the Program's Joint Accounts, just as it would for any other customer's funds, and would make and keep for the Joint Accounts the books and records required by FCMs for their customers pursuant to the Commission's rules.<sup>11/</sup> Program participants would be permitted to dispose of their interests in a Joint Account at any time, but only through or a designated successor FCM.<sup>12/</sup>

Cooperatives participating in the Program will pay a commission for each round-turn transaction equal to not more than one-half cent for each gallon of a petroleum product con-

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<sup>8/</sup> (...continued)

and then decide whether they wish to have that physical commodity ownership hedged (or not) by entering (or not entering) that transaction on a different computer screen.

<sup>9/</sup> In light of the small inventory positions of cooperatives participating in the Program, you have indicated that in all likelihood each Joint Account will only own one contract. You further represented, however, that the Program does not prohibit a Joint Account from owning two or more contracts. Item 1(a) of the JAA provides that each Joint Account will hold contracts only for a single commodity which will have the same expiration date.

<sup>10/</sup> This provision is found at Item 6 of the JAA. See generally Part 190 of the Commission's rules, which concerns the bankruptcy of commodity brokers.

<sup>11/</sup> See generally Rules 1.20 - 1.32, and 1.36.

<sup>12/</sup> Items 6 and 7 of the CMA set forth these restrictions on the use of FCMs under the Program.

tract represented by the participant's interest in a Joint Account.<sup>13/</sup> There will be no other fees (e.g., no bid/asked spread) for participating in the Program from either or

With the exception of certain restrictions discussed below, the Joint Accounts will be free to purchase or sell futures or options contracts as they choose. Moreover, while may make trading recommendations to Program participants, each order for participation in a Joint Account must be authorized by a Program participant. Neither nor any other person will hold discretionary trading authority over any Joint Account.<sup>14/</sup>

To protect participants from becoming involved in futures or options contracts for which there is inadequate liquidity to make those contracts appropriate for hedging purposes, contracts available through the Program would be either the futures or option contract expiring two months after anticipated product delivery, with the option's strike price being "at the money."<sup>15/</sup> Further with respect to options, it is expected that options (put and call) will be purchased to establish positions and will be sold only to liquidate positions. anticipates that the Program initially also would be limited to: (1) contracts based upon gasoline and heating oil, although other petroleum-based products may be added in the future; and (2)

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<sup>13/</sup> Thus, for example, if a participant's interest in a Joint Account that owned a Heating Oil No. 2 contract represented 24,000 gallons, the participant would pay a round-turn commission to of \$120.

<sup>14/</sup> This restriction is set forth at Item 1(a) of the JAA.

<sup>15/</sup> Item 8 of the JAA sets forth these restrictions. You further have explained that with respect to an option that is in-the-money on the expiration date, intends that the option will be liquidated and that a new in-the-money option will be established. In this regard, you further have explained that inasmuch as the Program is intended to provide a hedging mechanism for inventory that is constant (i.e., a tank that is filled and refilled), subsequent in-the-money option positions may be established until such time as there are no Program participants remaining in the Joint Account.

In order to facilitate the administration of the Program, contemplates that futures and option contracts acquired thereunder will be offset prior to expiration.

hedging transactions.<sup>16/</sup> To ensure the orderly administration of the Program and the creation and operation of the Joint Accounts: (1) will not be obligated to execute orders more than twice daily; (2) orders placed with will automatically be considered effective only at 's next designated time for execution of Program orders; and (3) Program participants will be advised of 's designated times for execution of Program orders and of any changes in those times.<sup>17/</sup>

Legal title to all contracts acquired as part of the CMA will be held by and Program participants in Joint Accounts pursuant to the terms of the JAA (discussed below) and for which has agreed to serve as the "customer of last resort." Specifically in this regard, the JAA requires to acquire an interest in a Joint Account to the extent needed to (1) permit the Joint Account to trade in full contracts rather than fractions of a contract, and (2) facilitate the liquidation of any other tenant-in-common's interest.<sup>18/</sup> A Joint Account will be created each time one or more full contracts are acquired on behalf of the tenants-in-common therein. Additional interests with respect to positions in the same contract may be added to an existing Joint Account.<sup>19/</sup> In further support of your request

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<sup>16/</sup> In this regard, Item 8 of the CMA requires each Program participant to represent that all of its Program transactions "shall be solely for bona fide hedging of inventory actually owned or to be purchased . . . and not for speculation." You have represented that while anticipatory hedges could be entered into under the Program, this type of transaction would represent the "small end of activity." You further have represented that although spread transactions currently are not allowed under the Program, at a later date may seek to have such transactions included and would at that time provide us with further information as to how such transactions would be handled and accounted for.

Item 8 also provides that no interest acquired by a participant in the Program may be assigned except by operation of law to a successor in interest.

<sup>17/</sup> Item 5 of the CMA sets forth these restrictions.

<sup>18/</sup> Item 1(b) of the JAA.

<sup>19/</sup> Inasmuch as it appears that each Joint Account will not be owned by identical cooperatives, it appears that Rule 1.46, which generally requires an FCM to offset long and short positions of  
(continued...)

you have represented that                      will be fully hedged against the risk of loss arising from its net exposure as the customer of last resort.

The CMA discloses to Program participants the risk of liquidation of a position held by a Joint Account.<sup>20/</sup> Specifically, it discloses that while a participant is a tenant-in-common with all other participants in the Joint Account, it bears the risk that another tenant-in-common in the same Joint Account will not meet its obligations or will wish to reduce or close out its interest and that                      may not satisfy its obligation to acquire such interest from that tenant-in-common. In this regard, the CMA explains that while                      has agreed to acquire the interest of a defaulting or withdrawing tenant-in-common, and to make such payments as may be necessary to sustain the interest of the other tenant-in-common, if                      fails to perform as agreed, the position held in the Joint Account cannot be transferred and, thus, the Account will be liquidated. Thus, the CMA makes clear that while a participant in a Joint Account has no obligation to cover the losses of any other participant in the Joint Account, the participant also has no protection other than under general contract law with respect to the maintenance of its interest held in the Joint Account in the event                      fails to act as the customer of last resort.

The CMA also discloses that in the event that                      determines to terminate the Program, it will provide each Program participant with written notice of that fact no later than 90 days prior to the date of termination and, notwithstanding such decision to terminate, it will continue to accept orders for liquidation under the Program until all Joint Accounts existing at the time                      determined to terminate the Program are liquidated in an orderly manner.<sup>21/</sup>

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<sup>19/</sup> (...continued)

the same customer, will not apply to the operation of the Joint Accounts. However, in the event that a Joint Account owned by certain cooperatives held a short position and another Joint Account owned by the same cooperatives held a long position such that Rule 1.46 would apply, the Division would not recommend that the Commission take any enforcement action against the FCM at which the Joint Accounts were carried for failure to comply with Rule 1.46.

<sup>20/</sup> This provision is found at Item 7 of the CMA.

<sup>21/</sup> This provision is found at Item 10 of the CMA. In this regard, you have represented that the contracts to be owned by  
(continued...)



The JAA will be entered into between \_\_\_\_\_ and  
22/ It provides in pertinent part that:

and all [Program participants]  
having an interest in any of the Joint Ac-  
counts shall own such Joint Account as ten-  
ants in common and not as partners or joint  
tenants with right of survivorship. The  
interest of \_\_\_\_\_ and each of the [partic-  
ipants] in the Joint Account shall be repre-  
sented by a separate subaccount within such  
Joint Account. The relative percentage own-  
ership of any Joint Account by \_\_\_\_\_ and  
each of the [participants] shall at all times  
reflect the market value of the subaccount  
owned by each of them in that Joint Account  
as a percentage of the market value of the  
entire Joint Account. . . . Neither  
nor any of the [participants] shall withdraw  
any asset other than cash from any Joint Ac-  
count. Each [of the participants] shall  
direct the investment of such [participant's]  
subaccount in any Joint Account. Each [of  
the [participants] shall be free to withdraw  
all or any portion of its subaccount which is  
represented by cash at any time.  
shall have no authority to withdraw any as-  
sets from a [participant's] subaccount.23/

. . . . .

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21/ (...continued)

the Joint Accounts typically will be expiring within 60 to 90  
days after they are acquired.

22/ The JAA is attached as Exhibit A to the CMA which each  
Program participant must execute with \_\_\_\_\_ and, by Item 7 of  
the CMA, is incorporated by reference into the CMA.

Item 5 of the JAA provides that \_\_\_\_\_ may resign as  
account manager upon thirty days' written notice to all partici-  
pants who have an interest in a Joint Account, and may appoint a  
successor which is affiliated with \_\_\_\_\_, if \_\_\_\_\_ agrees  
to guarantee the performance of such affiliate, within such  
thirty day period. If no successor is timely appointed, the  
Joint Account will be liquidated and closed.

23/ Item 1(a) of the JAA.

All income, gains and losses derived from activity in the Joint Account and all margin requirements shall be computed separately for each subaccount and shall be allocated to \_\_\_\_\_ and each of the [participants].<sup>24/</sup>

The JAA also provides that \_\_\_\_\_ may withdraw on a semi-annual basis realized gains, if any, of any Joint Account attributable to \_\_\_\_\_'s interest in such Joint Account. Further in this regard, we understand that any such withdrawal permitted under the JAA cannot exceed a Program participant's or \_\_\_\_\_'s respective equity interest in the Account.

To ensure that \_\_\_\_\_ meets its responsibilities as the "customer of last resort" for each Joint Account created pursuant to the CMA, the JAA requires that \_\_\_\_\_ must fund its own account at \_\_\_\_\_ and acquire interests at its own risk in any Joint Account in accordance with reasonable requests from \_\_\_\_\_ in order to --

(i) provide such fractional orders for the account of \_\_\_\_\_ as may be needed by \_\_\_\_\_ to complete fractional orders of the [participants], (ii) meet any margin call on \_\_\_\_\_'s interest in any Joint Account; (iii) permit the liquidation of any [participant's] interest in any Joint Account; or (iv) offset any interest of \_\_\_\_\_ in any Joint Account. \_\_\_\_\_ shall notify \_\_\_\_\_ of the interest which needs to be acquired by \_\_\_\_\_, and \_\_\_\_\_ shall thereupon immediately place an order for the futures or option contract position needed to establish such an interest.<sup>25/</sup>

Thus, the JAA requires that upon the failure of a Joint Account tenant-in-common to perform its obligations under the JAA, \_\_\_\_\_ must take such action as is necessary to protect

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<sup>24/</sup> Item 4(a) of the JAA.

<sup>25/</sup> To evidence \_\_\_\_\_'s ability to make such deposits as may be required of it, you provided to us a copy of \_\_\_\_\_'s audited financial statements for the year ending August 31, 1990. Those statements disclosed, among other things, that as of August 31, 1990 \_\_\_\_\_ had total assets of \$1,352,889,000, which included total current assets of \$683,309,000 (and of which cash and cash equivalents represented \$26,384,000).

the interests of the other tenants-in-common in the Joint Account -- i.e., it must acquire the interest of the defaulting tenant-in-common. The JAA makes clear, however, that is only required to meet margin requirements for positions with respect to any contract(s) represented by its interest in the Joint Account, whether acquired initially by or as a result of the acquisition of the interest of a defaulting tenant-in-common. Under the JAA, then, is not responsible for the payment of margin with respect to any other circumstances.<sup>26/</sup>

The JAA provides that the price of any interest liquidated by a participant and acquired by will be based on an intra-day market price determined by in accordance with uniform procedures adopted by from time to time, notice of which procedures will be provided in advance of the execution of the JAA.<sup>27/</sup> The JAA further provides that will inform and the participant of the liquidation price and that: (1) will pay any resulting positive net equity (reflecting the participant's interest which is being liquidated) to the participant; and (2) the participant will pay any result-

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<sup>26/</sup> will thus have a claim against any defaulting tenant-in-common whose interest it has acquired pursuant to the JAA, to the extent of the margin owing on that tenant-in-common's interest at the time of acquisition.

<sup>27/</sup> Item 3 of the JAA. You represented that has the capability of printing the screen of the price quotations at a particular hour of the day to create a record of the intra-day pricing upon which these transactions would be based. In this regard you stated:

For example, might decide to print the screen at 10 a.m. and 1 p.m. The acquisition of participant interests by as a substitute for actual liquidation of such interests would be uniformly handled on the basis of the market price at these times. As presently contemplated, orders would be held until the next price becomes available as shown by the printed screen. Because transactions would be deferred until the next available pricing time, these transactions would be based on contemporaneous price quotations.

ing negative net equity (reflecting the participant's interest being liquidated) to 28/

The JAA also prohibits \_\_\_\_\_ from independently placing orders for futures or option contracts through any Joint Account. 29/

The JAA requires that \_\_\_\_\_ must provide (1) to all reports and confirmations for each Joint Account as are required by Rules 1.33 and 1.46, and (2) to each of the owners of a Joint Account all reports and confirmations as are required by Rules 1.33 and 1.46 with respect to each such participant's interest in the funds and positions carried in the Joint Account. We understand that these reports and confirmations will show the number of whole positions held by the Account and the fractional interest held in the Account by the respective owner. In addition, \_\_\_\_\_ and \_\_\_\_\_ must separately account for all interests of each of the participants in any Joint Account in futures or option contracts (including fractional interests in any such Account) resulting from orders placed by participants.

\_\_\_\_\_ will open a customers' omnibus account with \_\_\_\_\_, and the trades of each Joint Account will be cleared through that omnibus account. Any margin needed for a Joint Account relating to interests held by Program participants will flow from Program participants to \_\_\_\_\_ and then to \_\_\_\_\_ for credit to the omnibus account. Margin funds relating to interests held by \_\_\_\_\_ will similarly flow from \_\_\_\_\_ to \_\_\_\_\_ to \_\_\_\_\_.

\_\_\_\_\_ would allocate margin calls to Program participants based upon their proportionate interest in the underlying contract held by the Joint Account. If a Program participant defaulted on a margin call, \_\_\_\_\_ would be required to assume that participant's interest in the Joint Account. If \_\_\_\_\_ failed to perform its obligation to act as customer of last resort, the JAA gives \_\_\_\_\_ the authority to immediately place orders to offset the then existing positions of any Joint Account.

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28/ In the event that the Joint Account is liquidated and with respect to the interests of the tenants-in-common therein, \_\_\_\_\_ will pay on a pro rata basis any resulting positive net equity to the tenants-in-common thereof and will seek payment on a pro rata basis from such tenants-in-common for any resulting net deficit.

29/ Item 1(b) of the JAA makes clear, however, that \_\_\_\_\_ may take positions separately outside of any Joint Account which may be contrary to the position represented by its interest in a Joint Account.

count. In this regard, you provided us with a sample "third party agreement" that each Program participant would be required to execute and you explained that the agreement was intended to avoid the problem of a Program participant failing to meet a margin call. The agreement requires that all margin calls will be met and made by wire transfer. You have represented that the CMA will disclose to Program participants that: (1) will not guarantee or limit the loss of any Program participant with respect to the trading of its own interest in a Joint Account; (2) will not use the funds of a participant in a Joint Account other than , as is provided for in the JAA, to secure, guarantee or otherwise satisfy obligations arising from another participant in the Account; and (3) in the event that fails to perform its obligations under the JAA with respect to the interest of a defaulted participant in a Joint Account, will not hold any other participant in the Account responsible for the defaulted participant's or 's obligations.

Based upon the foregoing, the Division will not recommend that the Commission take any enforcement action against or for failure to register as a CPO in connection with the administration of the Program and the creation and operation of the Joint Accounts. Also based upon the foregoing, the Division will not recommend any enforcement action against or under Section 4(a) of the Act, 7 U.S.C. §6(a) (1988). Further, the Division will not recommend any enforcement action under Rule 1.56 based upon 's relationship to and 's participation in paying margin that is defaulted in a Joint Account or under Section 4d of the Act for combining in a single account 's and customers' positions. These no-action positions are based upon our understanding of, among others, the representations stated above that: (1) only cooperatives who are members of the cooperative system would be permitted into the Program<sup>30/</sup>; (2) the purpose of the Program is to allow these cooperatives to hedge their inventories of petroleum products; (3) the Program is restricted to hedging transactions; (4) the creation and operation of Joint Accounts under the Program similarly is intended to provide a hedging mechanism for the cooperatives; (5) the decision as to whether to participate in the Program (and thus in the creation of a Joint Account) remains solely with the cooperative; and (6) will provide reports and confirmations to and for both the Joint Account and

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<sup>30/</sup> In this regard, the fact that, as is noted above, may waive these requirements for non-member affiliates of in which has a 50% or more ownership interest does not affect our determination.

each individual owner thereof, which will show the number of whole positions held by the Account and the fractional interests held in the Account by                      and the respective owner. These positions are, however, subject to the conditions that: (1)                      and                      will make available to the Commission and the National Futures Association such books and records pertaining to their activities in connection with the Program and the Joint Accounts as may be requested; (2) in the event the Division so requests,                      will report to the Division the interests held by                      in Joint Accounts in such form as the Division may request; (3)                      will monitor the Joint Account interests of Program participants that appear inconsistent with bona fide hedging activities; and (4)                      treat as a "customer account" each Joint Account, notwithstanding that                      has an ownership interest in any such Account that equals or exceeds 10 percent of the Account.<sup>31/</sup>

Further based upon the foregoing, we confirm to you that neither                      nor                      would be subject to regulation as a CTA. In the case of                      , this confirmation is based upon the fact that Section 2(a)(1) of the Act excludes from the definition of the term "commodity trading advisor" a person who is registered as an FCM and who provides advisory services solely incidental to the conduct of its business or profession.                      is registered as an FCM, and the Program will only be

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<sup>31/</sup> Under Rules 1.20 through 1.32 and 1.36, an FCM has certain responsibilities with respect to its treatment of customers', but not proprietary account, funds -- e.g., to segregate and separately account for customer funds (Rule 1.20). These responsibilities generally are intended to ensure the protection of customer funds. For the purpose of Rules 1.20 through 1.32 and 1.36, however, Rule 1.3(k) excludes from the term "customer" an owner or holder of a proprietary account defined in Rule 1.3(y).

Rule 1.3(y) defines a "proprietary account" as, among others, a commodity interest trading account carried on the books of a corporation of which 10 percent or more is owned by a business affiliate that directly or indirectly controls the corporation. Inasmuch as (1) the Joint Accounts will be carried on                      's books, and (2)                      , as an 81 percent holder of                      's Class A stock has the authority to control (by appointing five of the six members of                      's Board of Directors), each Joint Account in which                      has a 10 percent or more ownership interest would (otherwise) be required to be treated as a proprietary account and would therefore not be entitled to the same customer funds protections as those of                      's other customers who do not participate in the Program.

available through \_\_\_\_\_ and to its customers. Accordingly, we believe \_\_\_\_\_ qualifies for the exclusion from the CTA definition with respect to the instant case.<sup>32/</sup> As for \_\_\_\_\_, we note that under the Program it will not provide any commodity interest trading advice but, rather, will function solely as the "customer of last resort." Accordingly, we do not believe that \_\_\_\_\_ will be a CTA as a result of its participation in the Program.

We note that this letter does not excuse \_\_\_\_\_ or \_\_\_\_\_ from any otherwise applicable requirements set forth in the Act or the Commission's regulations thereunder. For example, they each remain subject to the anti-fraud provisions of Sections 4b and 4c of the Act, 7 U.S.C. §§ 6b and 6c (1988), with respect to their CPO activities and to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the regulations.<sup>33/</sup> Further, this letter is applicable solely to \_\_\_\_\_ and \_\_\_\_\_ in connection with the administration of the Program and the creation and operation of the Joint Accounts.

The positions taken in this letter are based upon the information that has been provided to us and is subject to compliance with the conditions set forth above. Any different, changed or omitted facts or conditions might require us to reach a different conclusion. In this connection, we request that you notify us immediately in the event the administration of the Program or the creation and operation of the Joint Accounts, including eligible participants, trading restrictions, or the responsibilities of \_\_\_\_\_ or \_\_\_\_\_ thereunder, change in any way from those as represented to us.

The positions taken in this letter are those of the Division of Trading and Markets only. They do not necessarily represent the views of the Commission or any other office or division of the Commission.

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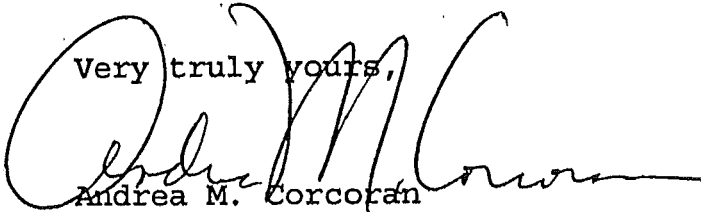
<sup>32/</sup> The Section 2(a)(1) exclusion is self-executing. No further action needs to be taken to claim the relief available thereunder.

<sup>33/</sup> In this regard, \_\_\_\_\_ and \_\_\_\_\_ may wish to seek guidance from the staff of the Commission's Division of Economic Analysis as to the application of these Parts to the Program and the Joint Accounts.

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If you have any questions concerning the foregoing, please contact Susan C. Ervin, Chief Counsel, Division of Trading and Markets, at (202) 254-8955.

Very truly yours,



Andrea M. Corcoran  
Director